No. 80-890

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES J. LIOTTA,
Petitioner,

v.

NATIONAL FORGE COMPANY,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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II. REPLY TO ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner's principal argument for granting the writ is that two federal courts of appeal have rendered decisions in conflict with the decision of the Third Circuit Court of Appeals on the question presented. Petition at 5-6, citing Smart v. Ellis Trucking Co., Inc., 580 F.2d 215 (6th Cir. 1978), cert. den., 440 U.S. 958 (1979), and Mitchell v. United Parcel Service, Inc., 624 F.2d 394 (2d Cir. 1980), cert. granted, 49 U.S.L.W. 3270 (Oct. 14, 1980) (No. 80-169, 1980 Term).

Respondent's principal argument in opposition to granting the writ, first raised in the brief in opposition, is that there is a "fundamental difference" between the instant case and those decided by the Second and Sixth Circuits. The alleged difference is that this action is against an employer only, whereas in Smart, supra, and Mitchell, supra, plaintiffs had elected to sue both former employer and union. Brief in Opposition at 3-4.

Respondent's argument should be rejected for the following independently-sufficient reasons.

1. Respondent has misread Smart, supra. Plaintiff in Smart filed his original complaint against the employer only. Later, he amended his complaint to add counts charging his local union with breach of the duty of fair representation and alleging a conspiracy between the employer and the union. 580 F.2d at 217.

The District Court dismissed the amended complaint. Counts II and III were dismissed on the ground that they were time-barred. The Court of Appeals affirmed this portion of the decision below. Id. at 217-18.

The Court then turned to the District Court's dismissal of Count I, the breach of contract action against the employer only. Even though the union was not a defendant the Court of Appeals held that the action was not in the nature of a motion to vacate or modify an arbitration award, hence that the statutes of limi-

tation in the federal arbitration statute and in the state rules of court dealing with arbitration should not be applied. 580 F.2d at 219.

This decision is directly in conflict with the decision of the Third Circuit Court of Appeals in the instant case. The Third Circuit Court of Appeals itself characterized the decision in Smart, supra, as "contra" its decision here. Petition at A-9.

2. There is reason to doubt that Respondent has accurately characterized the basis of the Third Circuit Court of Appeals' decision. The only reference in the decision to the fact that plaintiff here sued the employer only occurs in a paragraph which begins "Moreover." Petition at A-8. The cases cited by the Third Circuit Court of Appeals in support of its decision are cases in which unions as well as employers were defendants. Petition at A-8 and 9. The Third Circuit appears to have announced a rule which it would apply to cases in which an employee

sued both an employer and a union, as well as to cases in which an employee sued an employer only, which rule is accordingly in conflict not only with the decision in Smart, supra, but also with the decision in Mitchell, supra, where both employer and union were defendants.

3. Assuming for the sake of argument that Respondent has characterized the basis of the Third Circuit Court of Appeals' decision correctly, this Court has additional reasons for granting the writ. This Court ha made it clear that an employee plaintiff in a §301 case must allege that the union has unfairly represented him or her, but may or may not elect to make the union a defendant "to facilitate his case." Vaca v. Sipes, 386 U.S. 171, 186-87 (1967). The Third Circuit as interpreted by Respondent would draw fundamental jurisdictional consequences from a decision this Court, in Vaca, supra, characterized as discretionary. Furthermore, if the decision of the Third Circuit Court of Appeals in this case is understood

to mean that different limitation periods should apply to employers and unions in §301 cases, that holding would directly conflict with contrary decisions of the Second and Eighth Circuits. Abrams v. Carrier Corp., 434 F.2d 1234, 1252-53 (2d Cir. 1970), cert. den., 401 U.S. 1009 (1971). Butler v. Local Union 823, 514 F.2d 442, 447-48 (8th Cir. 1975), cert. den., 423 U.S. 924 (1975).

4. It appears to be Respondent's view that the decision of the Third Circuit Court of Appeals means that different limitation periods should apply not only depending on the state in which the action is brought, but depending also on whether the action occurs before or after arbitration, and whether the union is or is not a defendant. Such a view might prompt this Court to grant certiorari because of a concern with the fragmentation of federal labor law expressed by Justice White, dissenting, in International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 709 et seq. (1966).

III. CONCLUSION

For the foregoing reasons, the writ of certiorari petitioned for should be granted.

Respectfully submitted,

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